BEFORE THE ENVIRONMENTAL PROTECTION AUTHORITY

IN THE MATTER of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

AND

IN THE MATTER of an application for a marine dumping consent by Coastal Resources Limited to dump dredged material at a deep-sea site east of Great Barrier Island

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MEMORANDUM OF COUNSEL ASSISTING THE DECISION-MAKING COMMITTEE – RESPONSE TO MINUTE 2

12 October 2018

Environmental Protection Authority
Wellington

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MAY IT PLEASE THE COMMITTEE:

INTRODUCTION

1. The Decision-making Committee ("**DMC**") considering Coastal Resources Limited's ("**CRL**") application for marine dumping consent has identified two legal issues in respect of which it seeks advice from counsel assisting the DMC. The request was made in Minute 2, dated 24 September 2018, and reads as follows:

    (a) *High Court decision on Trans-Tasman Resources Limited*

    We note that the High Court has recently released its decision in the appeal against the grant of marine consents to Trans-Tasman Resources Limited. Please provide a summary of this decision, and in particular please highlight any factors arising in respect of adaptive management that the DMC should be aware of in dealing with the CRL application.

    (b) *Status of existing marine consent*

    CRL currently holds a deemed marine consent enabling dumping of 50,000 tonnes of dredged material to the site which is the subject of the current application for dumping of 250,000 tonnes of dredged material.[1] *In its application, it has stated it will surrender the existing consent if a new consent is granted (page 53 of the Impact Assessment).*

    Please provide advice on how the DMC should account for the existing marine consent in its consideration of the new application. Please also provide advice on the legal mechanisms available, if a new marine consent is granted, to deal with the existing marine consent by surrender or otherwise.

2. We set out our advice on these matters below.

HIGH COURT DECISION ON TRANS-TASMAN RESOURCES LIMITED

Introduction

3. The DMC has asked for a summary of the recent High Court decision *The Taranaki-Whanganui Conservation Board and Others v The Environmental Protection Authority* [2018] NZHC 2217 ("**the TTRL decision**").

[1] We note that at section 3.1 and Appendix 1 of the Impact Assessment by CRL the quantity of dredged material in this application and the existing consent is referred to in m^3, our response below uses this unit of measure.

4. It should be noted at the outset that the TTRL decision was decided under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ("**EEZ Act**") as at August 2016. Therefore the amendments to the EEZ Act introduced through Part 5 of the Resource Legislation Amendment Act 2017 did not apply. The amended legislation does apply to the CRL application.

5. The TTRL decision is lengthy as it involved numerous grounds of appeal, many of which were issues relating to interpretation of the EEZ Act being considered by the High Court for the first time. The decision therefore provides a wide array of useful guidance to the DMC. In particular, despite a wide range of challenges, the TTRL decision was found to have been lawfully made, with one exception relating to adaptive management. The decision has since been appealed (the leave application is currently being considered by the Court of Appeal), however, it remains the law until it is overturned on appeal (if that occurs). On that basis it is the reference for decisions on relevant matters under the EEZ Act.

Adaptive management

6. The EEZ Act prohibits conditions being granted on a marine discharge consent or, as relevant to CRL's application, a marine dumping consent, that together amount or contribute to an adaptive management approach.[2]

7. The DMC considering TTRL's application appreciated that to be the case;[3] legal advice and submissions received by that DMC (from both its legal advisors and Crown Law)[4] expressed the view that, while the legislation was unclear, the key factor categorising such an approach was likely to be conditions requiring discontinuance of the activity if certain effects were to arise.[5] However, the High Court, relying on section 64(2)(b) and in particular the words "*or continued with or without amendment*", considered that focusing on discontinuance alone was too narrow. The High Court favoured a broad reading of the examples in section 64(2)(b) as that was *"consistent with the purpose of environmental protection and the statutory obligation to favour caution"*.[6]

[2] As a result of section 87F(4) of the EEZ Act (now repealed although replaced by section 64(1AA) as addressed below).
[3] See paragraphs [347] and [349] of the TTRL decision.
[4] At paragraphs [361] and [362].
[5] At paragraph [377].
[6] At paragraph [400].

8. Further, the High Court held that the conditions imposed by the DMC constituted or contributed to an adaptive management approach.[7] In particular they involved the gathering of baseline information, making decisions in stages, thresholds being set to trigger remedial actions, and activities to be ceased or modified depending on the information gathered.[8]

9. Importantly, in understanding what conditions amount or contribute to an adaptive management regime, the High Court held:[9]

> *"What distinguishes the monitoring and reporting conditions in the present case from "normal monitoring conditions" is that, it is not just monitoring to ensure compliance with environmental standards, it is monitoring to establish what the environmental baselines are, because of uncertainty or inadequate information coupled with a potential modification or cessation of the activity, depending on the circumstances revealed by the information."*

10. Put succinctly, the High Court accepted the argument of an appellant, the Royal Forest and Bird Protection Society of New Zealand Incorporated, that "*the key to adaptive management is that it involves allowing an activity to be carried out so that its effects can be monitored and assessed and the activity modified or discontinued accordingly*".[10]

11. The High Court considered adaptive management to be *"very sensible"*[11] and could not clearly determine why it was excluded for marine discharges (as such an outcome is not required by the relevant international conventions)[12] but concluded that it is simply not available for marine discharge consents under the EEZ Act.[13]

12. The relevant EEZ Act provisions were amended through the Resource Legislation Amendment Act 2017. Section 87F was repealed and subsection 1AA was added into section 64.[14] It states that section 64 (adaptive management) does not apply to marine discharge and dumping consents. Again, the prohibition remains somewhat indirect as section 63 retains wide scope for the imposition of conditions, but in our opinion the change in location of the prohibition through the amendment has not materially changed

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[7] At paragraph [404].
[8] At paragraph [399].
[9] At paragraph [401].
[10] At paragraph [402].
[11] At paragraph [404].
[12] At paragraph [80].
[13] At paragraph [404].
[14] See also section 61(4).

its effect. We consider that the reasoning in the High Court's decision remains equally valid and adaptive management conditions are unable to be imposed on a marine dumping consent, as relevant to the present application by CRL, or a marine discharge consent.

13. The effect of the Court's decision will need to be carefully considered by the DMC in this case.

Summary of other findings

14. None of the other appeal grounds were successful, and the Court has analysed and made findings on a variety of other legal issues that may be relevant in the present case, and are likely to be relevant in future marine consenting processes.

15. Key findings can be summarised as follows:

    (a) The decision by the EPA on whether to return Trans-Tasman Resources Limited's application as incomplete was a discretionary procedural decision taken by the EPA, separate and discrete to the ultimate decision on the consent itself, and potential submitters do not have a right of objection or appeal in relation to such a decision.[15]

    (b) In that case, the DMC made a reasoned and considered decision that there was no basis for returning the application.

    (c) The DMC correctly identified the statutory purposes (in section 10 of the EEZ Act) and explained how they had been taken into account in the decision.[16]

    (d) The obligation to take into account the nature and effect of other marine management regimes is not "*an obligation to implement or give effect to those regimes, but to pay attention to those regimes and to weigh the nature and effect of them in addressing any effects on the environment or existing interests of allowing the activities for which consent was sought*".[17] The DMC did not make an error in this regard. In particular, the DMC clearly considered and took into account the Resource Management Act 1991 ("**RMA**") and the New Zealand Coastal Policy Statement and, while differing from the minority in the

[15] At paragraph [67].
[16] At paragraph [121].
[17] At paragraph [160].

weight applied to those regimes, did not make an error of law in doing so.[18]

(e) The DMC did not misunderstand its obligations under section 11, in respect of international conventions relating to the marine environment.[19]

(f) Although tikanga Māori is a matter for the DMC to consider under section 59(2)(m) ("*any other matter…*"), it was not required to be considered under section 59(2)(l) ("*any other applicable law*").

(g) The DMC was aware of the obligation arising under section 59(2)(f) ("*take into account … the economic benefit to New Zealand of allowing the application*") and appropriately took it into account; to do so need not entail a quantitative cost benefit analysis.[20]

(h) The DMC did not limit its consideration of existing Māori interests to just physical matters.[21]

(i) A cultural impact assessment from tangata whenua is not a mandatory requirement for a complete marine consent application.[22]

(j) The DMC specifically considered existing Māori interests[23] and clearly had regard to advice received from the Māori Advisory Committee.[24]

(k) The definition of "*existing interest*" does not include claims made, but not determined, under the Marine and Coastal Area (Takutai Moana) Act 2011.

(l) New Zealand's obligations under the United Nations Declaration on the Rights of Indigenous Peoples are subsumed within the express provisions of the EEZ Act.[25]

(m) The DMC correctly applied the law relating the interests of iwi under the Treaty of Waitangi, in accordance with sections 12, 59, and 60 of the EEZ Act.[26]

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[18] At paragraph [162].
[19] At paragraph [175].
[20] At paragraph [191].
[21] At paragraph [205].
[22] At paragraph [215].
[23] At paragraph [227].
[24] At paragraph [228].
[25] At paragraph [237].
[26] At paragraph [243].

(n) The DMC did not err in using its powers to request information under section 61(1).[27]

(o) The appellants did not establish that the DMC erred in following the requirement to base its decision on the best available information.[28]

(p) No error was made in respect of the availability to the parties of the applicable Decision-Making Procedures.[29]

(q) The DMC did not err in its approach to a bond condition.[30]

(r) The DMC did not err in deciding that its obligation was to comply with section 61(2) ("*favour caution…*") and not also to incorporate 'an extraneous precautionary ideal'.[31]

(s) The DMC did not make an error of law in failing to give weight to the prior decision, by a different DMC, on a prior application by Trans-Tasman Resources Limited.[32]

16. This advice is a high-level summary of the decision and its implications for the DMC. Counsel assisting the DMC would be happy to provide more detailed and focused advice on specific issues arising in this case.

STATUS OF EXISTING MARINE CONSENT

How should the DMC account for the existing marine consent in its consideration of the new application?

17. We consider that the existing deemed marine consent to dump 50,000m^3 of dredged material forms part of the existing "*environment*" against which the effects of the new 250,000m^3 consent application must be assessed. Under section 59(2)(b) of the EEZ Act, it is expressly noted that, when considering an application for marine consent, the consent authority must take into account "*the effects on the environment or existing interests of other activities undertaken in the area covered by the application*". Irrespective of that, a Court would be likely to read the "*environment*" as including activities for which consents have been approved, and which are likely to be implemented. This is consistent with RMA case law on the definition of

[27] At paragraph [275].
[28] At paragraph [294].
[29] At paragraph [299].
[30] At paragraph [312].
[31] At paragraph [336].
[32] At paragraph [419].

environment (i.e. *Hawthorn*[33] and related cases). We note that, while the EEZ Act differs from the RMA in numerous respects, the definition of "*environment*" is similarly broad in both the RMA and EEZ Act, and in our view the same principles in respect of what will come within that definition are likely to apply under both statutes.

18. Therefore, even if it were not for the express provision in section 59(2)(b), because the existing consent came into effect under the then-relevant requirements imposed by the Maritime Transport Act 1994, conceptually the DMC could assume that the effects of the activity it permits were a 'given'. This means that, provided the carrying out of the consent (which we understand expires in 2032) for the next 14 years was not fanciful, the dumping it permits would form part of the existing environment for that period, making it part of the state of affairs which the DMC must determine and take into account when assessing the effects of allowing the proposed consent.

19. That is, the DMC must consider the effects of the new application as if it were a consent to dump 200,000m^3 for up to 14 years (ie the component of the proposed dumping that is not already part of the existing environment), and then 250,000m^3 following that.

What legal mechanisms are available (if a new marine consent is granted) to deal with the existing marine consent by surrender or otherwise?

20. Section 63 states that "*a marine consent authority may grant a marine consent on any condition that it considers appropriate to deal with adverse effects of the activity authorised by the consent on the environment or existing interests*". This provides the DMC with a broad power to grant conditions and, in this case, it is our opinion that a condition preventing the consent holder from carrying out both consents at the same time is likely to meet this requirement (provided there is an effects-based rationale underpinning such a restriction, which seems likely). This is because the ceasing of the existing consent will reduce the overall discharge to the area (as set out above), which will therefore reduce the effects of the consent applied for by 50,000m^3 for the first 14 years of the consent.

21. Moreover, as the applicant has signalled its intention to surrender its existing consent, the DMC may wish to enquire whether the applicant is prepared to

[33] *Queenstown Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299; [2006] NZRMA 424 (CA).

offer up a condition regarding surrender on an *Augier* basis. The *Augier* principle is that where an applicant gives an undertaking and, relying on that undertaking, a decision-maker grants consent subject to a condition in terms broad enough to encapsulate the undertaking, the applicant cannot later argue that the condition is unenforceable. *Augier* conditions are relatively common in the consenting process under the RMA, and in our view can equally be proffered by applicants and imposed by the DMC in marine consent decisions under the EEZ Act.

DATED at Wellington this 12th day of October 2018

Celia Haden / David Randal

Counsel assisting the Decision-Making Committee